ORIGINAL

NO. 88-6873

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1988 TERM

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CHANDLER CLEMONS — PETITIONER

VERSUS

STATE OF MISSISSIPPI — RESPONDENT

==========

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the court below, as the court of last resort for the State of Mississippi, has interpreted the state statutes as allowing it to uphold a sentence of death when one of several aggravating factors is found to be invalid there is no federal constitutional violation, therefore certiorari should be denied.

2. Where the claim relating to the closing argument was not presented at the proper time or in the proper manner to the state courts and has never been passed on by the state courts this Court has no jurisdiction to consider the claim and therefore certiorari should be denied.

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CHANDLER CLEMONS PETITIONER

VERSUS

STATE OF MISSISSIPPI RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as Clemons v. State, 535 So.2d 1354 (Miss. 1988). A copy of this opinion is before this Court as an appendix to the petition for writ of certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. Section 1257(3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments VIII and XIV. He also relies on Mississippi Code Annotated, Section 99-19-101 (Supp. 1988).

STATEMENT OF THE CASE

A. FACTUAL HISTORY

The conviction of capital murder and sentence of death in the case at bar was for the armed robbery and murder of, Arthur Shorter, a pizza delivery man, by petitioner. The

brutal facts of this crime are fully set forth in the opinion of the Mississippi Supreme Court and we would adopt them as our statement of fact here. Clemons v. State, 535 So.2d 1354, 1356-1357 (Miss. 1988).

B. PROCEDURAL HISTORY

Petitioner was indicted for the capital murder of Arthur Shorter by the grand jury of the Circuit Court of Warren County, Mississippi during the May 1987 Term. On motion of the petitioner venue was changed to Harrison County, Mississippi. Petitioner's trial began on July 20, 1987. After the jury was empaneled petitioner was tried on the indictment and found guilty of capital murder. After the jury found petitioner guilty they heard evidence in aggravating and mitigation of sentence. They then retired to consider whether appellant would be sentenced to death or life imprisonment. After due consideration the jury returned a sentence of death in proper form with the following findings:

> We the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the commission of the capital murder:
>
> 1. Contemplated that lethal force would be employed.
>
> We the jury unanimously find that the aggravating circumstances of:
>
> 1. Capital offense was committed while the defendant was engaged in the commission of robbery and was committed for pecuniary gain;
>
> 2. The capital offense was especially heinous, atrocious or cruel
>
> are sufficient to impose the death penalty and that there are insufficient mitigating circumstances, and we unanimously find that the defendant should suffer death.
>
> R. 1249.

On automatic appeal to the court below petitioner raised the following claims:

> PROPOSITION ONE
>
> The Verdict Of The Jury And Sentence Of Death Is Violative Of Appellant's Rights And Is Against The Overwhelming Weight Of The Credible Evidence In View Of The Fact That The Co-Indictee, Anthony Calvin, Was The

Only Witness For The State Testifying To The Actual Crime Charged And Was Given Immunity From The Death Sentence In A Limited Plea Bargain Agreement With The State Of Mississippi

PROPOSITION TWO

The Court Erred In Not Granting The Defendant Instruction D-K At the Sentencing Phase Of The Trial. The Defendant Was Entitled To An Instruction Which Set Forth All Alleged Mitigating Factors.

PROPOSITION THREE

The Defendant Was Entitled To A Mercy Instruction In This Case Because The State Had Already Granted Mercy To A Codefendant, And It Was Reversible Error For The Lower Court To Refuse Defense Instruction D-Y At the Sentencing Phase Of The Trial.

PROPOSITION FOUR

The Death Sentence Was Imposed Under The Influence Of Passion And Prejudice Against Chandler Clemons.

PROPOSITION FIVE

The Evidence Does Not Support The Jury's Finding Of Aggravating Circumstances.

PROPOSITION SIX

The Sentence Is Excessive And Disproportionate To the Penalty Imposed In Similar Cases, Considering Both The Crime And The Defendant.

Appellant's Brief at 1.

During oral argument before the court below petitioner raised an additional claim relating to this Court's decision in Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.d 372 (1988). After oral argument the court requested additional briefs on this question. Briefs were filed with the court on the issue of the "especially heinous, atrocious or cruel" aggravating circumstance and how Maynard impacted on this case. On November 30, 1988 the court below issued its opinion affirming both the conviction and sentence of death imposed in this case. A petition for rehearing was filed and denied on December 21, 1988. Clemons v. State, 535 So.2d 1354 (Miss. 1988).

From this decision by the Mississippi Supreme Court petitioner brings this action.

REASONS FOR DENYING THE WRIT

Petitioner presents no cognizable claim under the Constitution or statutes of the United States upon which relief can be granted, therefore certiorari should be denied.

ARGUMENT

1. Where the court below, as the court of last resort for the State of Mississippi, has interpreted the state statutes as allowing it to uphold a sentence of death when one of several aggravating factors is found to be invalid there is no federal constitutional violation, therefore certiorari should be denied.

Petitioner contends that the Mississippi Supreme Court has no authority to affirm the death sentence in this case because one of the aggravating circumstances was invalid under this Court's ruling in Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). He argues that both Maynard and the Mississippi sentencing statute forbid the affirmance of this case. Petitioner's argument is based on faulty interpretation of the law in such matters.

He first contends that when one or more of several aggravating circumstances are found to be invalid, the death penalty cannot stand under the scheme for the imposition of the death sentence in Mississippi. This question need not be addressed by this Court as the basic flaw in the argument is, as we will show, there is no invalid aggravating circumstance in this case.

He argues that since the Mississippi statutory scheme requires a jury to impose the sentence of death, that the appellate court cannot apply a harmless error standard to the case and affirm the sentence. The interpretation of state law is left to the state courts. It is the well established province of state courts "to interpret and, where they see fit, to reinterpret" their own constitutions and statutes. See Gardner v. Louisiana, 368 U.S. 157, 169, 82 S.Ct. 248, 254, 7 L.Ed.2d 207, 216 (1961). An authoritative interpretation of a state statute by the state's highest court "puts these words in that statute as definitely as if

it had been amended by the legislature." Winters v. New York, 333 U.S. 507, 514, 68 S.Ct. 665, 669, 92 L.Ed.2d 840 (1948). Moreover, under Mississippi law, the Mississippi Supreme Court has "inherent power to prescribe rules of procedure to facilitate the administration of justice in [Mississippi] courts." Newell v. State, 308 So.2d 71, 78 (Miss. 1975); Hall v. State, 539 So.2d 1339 (Miss. 1989). The Mississippi Supreme Court has held that not only can it affirm a sentence of death in a case where it finds an invalid aggravating circumstance [Clemons, at 1362; Pinkney v. State, 538 So.2d 329 (Miss. 1988); Lanier v. State, 533 So.2d 473 (Miss. 1988)], it can reimpose a sentence of death after it has been vacated by a federal court without having to remand the case for retrial before a jury. Reddix v. State, ___ So.2d ___ (No. DP-11, decided August 25, 1988)(Not yet reported.); Booker v. State, 511 So.2d 1329 (Miss. 1987), cert. denied, ___ U.S. ___, 99 L.Ed.2d 492, reh. denied, ___ U.S. ___ 100 L.Ed.2d 237 (1988); Bullock v. State, 525 So.2d 764 (Miss. 1987). He likewise contends that since Mississippi's death penalty statute requires that the aggravating circumstances be weighed against the mitigating circumstances prior to the imposition of the sentence of death the appellant court cannot correct this by the application of a harmless error analysis. This again is not true. Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), cert. pending, No. 88-7000; Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), cert. denied, ___ U.S. ___, 103 L.Ed.2d 597 (1989); Evans v. Thigpen, 809 F.2d 239 (5th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. 3278, 97 L.E.2d 782 (1987); Johnson v. Thigpen, 806 F.2d 1243, cert. denied, 480 U.S. 951, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987); Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.E.2d 1134 (1983).

Petitioner also misreads Maynard to hold that the aggravating circumstance of "especially heinous, atrocious or cruel" is per se invalid in any circumstance. This is not what this Court held. This Court held that the finding of this circumstance without a proper limiting instruction to the jury or a proper limiting construction by the appellate court caused the constitutional error. We realize that no limiting instruction was given to the jury in this case. We note that petitioner did not request a limiting instruction be given and the Mississippi Supreme Court held that the claim should be barred from consideration. 535 So.2d at 1362. The court below then considered the Maynard question. After reviewing the Maynard opinion the court below held:

> Unlike Oklahoma, this Court (Mississippi) has held and established unequivocally through the years that when on aggravating circumstance is found to be invalid or unsupported by the evidence, a remaining valid aggravating circumstance will nonetheless support the death penalty verdict. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). See Mississippi cases: Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988); Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987); Nixon v. State, 533 So.2d 1078 (Miss. 1987); Lockett v. State, 517 So.2d 1346, 1355 (Miss. 1987); Lockett v. State, 517 So.2d 1317, 1336 (Miss. 1987); Faraga v. State, 514 So.2d 295, 309 (Miss. 1987); Johnson v. State, 511 So.2d 1333, 1337 (Miss. 1987); Stringer v. State, 500 So.2d 928, 945 (Miss. 1986); Irving v. State, 498 So.2d 305, 314 (Miss. 1986); Wiley v. State, 484 So.2d 339, 351-52 (Miss 1986); Edwards v. State, 435 So.2d 664, 670 (Miss. 1983); Evans v. State, 422 So.2d 737, 743 (Miss. 1982).

535 So.2d at 1362.

The court below then pointed out that it had adopted a limiting construction to be applied to the "especially heinous" aggravating circumstance in Mississippi, stating:

> The United States Supreme Court in Maynard v. Cartwright held that the "especially heinous, atrocious or cruel" aggravating circumstance left the jury with unchanneled discretion and that the Oklahoma court had never adopted a limiting construction of "especially heinous, atrocious or cruel." Not so in Mississippi. This Court has placed a limiting construction on "especially heinous, atrocious or cruel." In Coleman v,. State, 378 So.2d 640 (Miss. 1979), the Mississippi Court adopted the construction found in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), which held:
>
> > What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart

> from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim. 578 F.2d at 61. (Emphasis added)[Emphasis the Court's].

378 So.2d at 648. See Jordan v. State, 464 So.2d 475, 478 (MIss. 1985).

In Evans v. State, 422 So.2d 737 (Miss. 1982), this Court applied a limiting construction of "especially heinous, atrocious or cruel" holding that those cases in which "mental torture and aggravation" were inflicted on the victim the same may also be considered as applying to the aggravating circumstance.

535 So.2d at 1363-1364.

Finally the court below concluded:

Considering that this court has placed a limiting construction on the aggravating circumstance of "especially heinous atrocious or cruel;" that Mississippi Law holds one invalid aggravating circumstance will not suffice to overturn a death penalty where one or more valid aggravating circumstance(s) remains; the brutal and torturous facts surrounding the murder of Arthur Shorter; and the narrowing instructions given to the jury by the lower court; it is inescapable that Maynard v. Cartwright does not dictate the court come of the case sub judice. Further, as the Fifth Court of Appeals said in Edwards v. Scroggy, supra:

> Considering the extent of Edwards' criminal record, it is inconceivable that the erroneously admitted misdemeanor conviction of carrying a concealed weapon affected the jury's decision.

we likewise are of the opinion beyond a reasonable doubt that the jury's verdict would have been the same with or without the "especially heinous, atrocious or cruel" aggravating circumstance.

535 So.2d at 1364.

The court below has reaffirmed this interpretation of the Mississippi statutes and Maynard's application to the Mississippi scheme in Pinkney v. State, 538 So.2d 329, 355-358 (Miss. 1988).

In Pinkney, supra, the Mississippi Supreme Court, considering a similar question, held:

> While the court in Maynard did not set forth a specific limiting construction to be used, this Court has in several instances placed a limiting construction on "especially heinous, atrocious or cruel."
>
> In Coleman v. State, 378 So.2d 640 (Miss. 1979), we recognized the construction found in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), which states:
>
> > What is intended to be included are those capital crimes where the actual commission of

> the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim. 578 F.2d at 611. (Emphasis in original).

378 So.2d at 648; se also, Jordan v. State 464 So.2d 475, 478 (Miss. 1985).

In Evans v. State, 422 So.2d 737, 743 (Miss. 1982), we held that the jury could consider "mental torture and aggravation which the victim probably underwent" in order to determine whether or not the murder was "especially heinous, atrocious or cruel." We note also that barbarity sufficient to satisfy this aggravating circumstance can be demonstrated by showing that the defendant utilized a method of killing which caused serious mutilation, where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, or where a lingering or torturous death was suffered by the victim. See also, Billiot v. State, 454 So.2d 445, 464=65 (MIss. 1984).

538 So.2d at 357.

The facts of the case at bar clearly fall within the limiting construction applied by the Mississippi Supreme Court. The facts as found by the court below are:

> Clemons, with gun in hand, told Arthur Shorter, the pizza delivery man, to get out of the vehicle and told him to "take out everything you have" and to take all his money out of his pockets. At that time, either Clemons or Hay threw the Keys to the pizza delivery vehicle into the bushes. Clemons ordered Shorter to lid down, which Shorter did. Clemons took the bag of money and some pizzas from the delivery vehicle. As he started on his way back to the car in which Calvin was sitting, Hay asked Clemons if Shorter had seen his face. Clemons replied in the affirmative. Hay then said, "Chandler, you got to blow his head off because he can identify you." Shorter begged Clemons not to shoot him. Clemons told Hay to pull their car farther down the hill, which he did. Clemons shot Shorter [with a sawed-off shotgun] and got into the car with Hay and Calvin and they started down the hill. Calvin looked back and saw Shorter raise his head once.
>
> The physical facts indicate that death for Shorter was not instantaneous; that after being shot, he dragged himself to his vehicle and attempted to get into it; and that having no keys with which to start the vehicle, he began making his way toward the apartment complex. After going some distance, he collapsed and died sometime later.

535 So.2d at 1356.

These facts fall within the narrowing construction applied by the Mississippi Supreme Court and cure any error in not instructing the jury on the meaning of the words in the aggravating circumstance. No evidence was presented to the

jury for its consideration that was prohibited by the federal constitution, therefore the state is free to apply its own harmless error analysis. Barclay, supra, 463 U.S at 956-958.

The Mississippi Supreme Court has interpreted the state statutes as allowing it to affirm a sentence of death so long as at least one valid aggravating circumstance remains. This is a state interpretation of state law and is not forbidden by the federal constitution. This Court has held that there is no "right way for a State to set up its capital sentencing scheme." Spaziano v. Florida, 468 U.S.447, 464, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The states can take different approaches to the classification of capital cases, see Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), and different procedures for determining whether death is appropriate in a particular case. See, e.g. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Just because other states do not hold that a death sentence cannot be reimposed under similar circumstances is not persuasive. This Court stated that "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sister over how best to administer its criminal laws." Spaziano, supra at 464. However, Mississippi is not alone in this interpretation of its statutes. The interpretation applied by the Mississippi Supreme Court appears to be most like that made by the Delaware Supreme Court in Flamer v. State 490 A.2d 104, 134-136 (Del. 1984), cert. denied, 474 U.S. 106 S.Ct. 185, 88 L.Ed.2d 154 (1984), holding that it was not actually a weighing state as contemplated by Zant, supra.

The Mississippi Supreme Court properly applied a harmless error analysis to the case at bar and found that the death penalty should stand. No federal constitutional right of petitioner has been violated therefore certiorari should be denied.

2. Where the claim relating to the closing argument has not been presented at the proper time or in the proper manner to the state courts and has never been passed on by the state courts this Court has no jurisdiction to consider the claim and therefore certiorari should be denied.

Petitioner raises for the first time in this petition a claim relating to the closing argument of the prosecutor in this case. His claim is that the use of biblical quotations by the prosecutor in his closing argument in some manner violated his rights to an individualized determination of his sentence of death. Petitioner has never raised this claim before the state courts. No assignment of error was presented on direct appeal to the court below raising any claim of improper argument nor was any objection whatsoever interposed during the closing argument at trial. We have a double default. In Mississippi if an objection is made at trail, no claim can be raised on direct appeal. Therefore this Court has no jurisdiction to consider this claim because the claim has never been presented to the state court at the proper time or in the proper manner. This Court has long held that it has no jurisdiction to hear questions unless they have first been presented at the proper time and in the proper manner to the state court. In Webb v. Webb 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981), this Court held:

> [T]here should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.
>
> 451 U.S. at 501.

See: Michigan v. Long, 463 U.S. 103, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.E.2d 572 (1969); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969). The state courts were never apprised of the nature or substance of this claim, therefore this Court has no jurisdiction to consider this claim.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above Brief in Opposition to the following:

Kenneth S. Resnick
Dinsmore & Shohl
511 Walnut Street
2100 Fountain Square Plaza
Cincinnati, Ohio 45202

This the 22nd day of May, 1989.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

AFFIDAVIT OF SERVICE OF PROCESS

I, Marvin L. White, Jr., being duly sworn, state the following:

1. I am a member of the bar of this Court and I am counsel for the Respondent in this action.

2. On May 22, 1989, I personally placed ten (10) copies of the enclosed Respondent's Brief in Opposition to the Petition for Writ of Certiorari to the Mississippi Supreme Court in the case of Chandler Clemons v. State of Mississippi, No. 88-6873, in a package properly addressed to the Clerk of this Court, with first-class postage prepaid, and deposited the package in a mailbox under the exclusive control, care and custody of the United States Postal Service within the City and State of Jackson, Mississippi.

3. I placed a copy of said Brief in Opposition to the Petition for Writ of Certiorari to the Mississippi Supreme Court in an envelope properly addressed to Honorable Kenneth S. Resnick, Dinsmore & Shohl, 511 Walnut Street, 2100 Fountain Square Plaza, Cincinnati, Ohio 45202 first-class postage prepaid, deposited the envelope in a mailbox under the exclusive control, care, and custody of the United States Postal Service within the City and State of Jackson, Mississippi.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

SWORN TO AND SUBSCRIBED BEFORE ME this, the 22nd day of May, 1989.

Debra Shelwood
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Sept. 16, 1989